


UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
SOUTHERN DIVISION

**FILED**  
**MAR 31 2008**  
  
CLERK

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DAVID W. BURTON,

Plaintiff,

vs.

MIKE MULLER, Now Unit Manager  
Housing, Harmon Unit,  
Mike Durfee State Prison; and  
TOM HOOKER, Housing Staff  
Coordinator, Unit "C" Trustee  
Building, Sioux Falls,

Defendants.

CIV 06-4045

ORDER

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Plaintiff late filed his response to the Defendants' Motion for Summary Judgment which also served as his objection to the Magistrate Judge's Report and Recommendation which recommended that the Defendant's Motion for Summary Judgment be granted. Plaintiff is pro se and his response to Defendants' Motion for Summary Judgment was due May 21, 2007, and was prepared March 10, 2008, and filed March 12, 2008. The excuse claimed is that Plaintiff's landlord interfered with Plaintiff's mail and that Plaintiff made his response as soon as he was aware of the Motion for Summary Judgment and Report and Recommendation. It appears from the Court Clerk's records that the Plaintiff was diligent in updating his address with the Clerk of Courts. As a result, the Court will consider Plaintiff's response as not having been waived. The Court has reviewed Plaintiff's response even though it was not timely filed. Even if the Plaintiff's response to the Motion for Summary Judgment was timely filed, the response would not, on the merits, prevent the entry of Summary Judgment for Defendants.

The remaining issue was whether or not there had been a constitutional violation because of

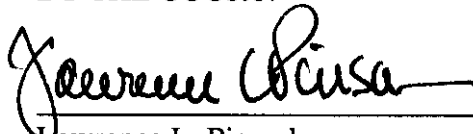
claimed retaliation against the Plaintiff. Plaintiff's claims of retaliation made in his sworn Motion are speculative and do not give rise to a triable issue of fact. In addition, even construing Plaintiff's claims, including his latest March 10, 2008 Motion liberally, the Plaintiff has not stated a constitutional violation. Accordingly,

IT IS ORDERED:

1. That the Magistrate Judge's Report and Recommendation, Doc. 57, is ADOPTED by the Court, Plaintiff's March 10, 2008, Motion, Doc. 59, is DENIED, and the Defendant's Motion for Summary Judgment, Doc. 47, is GRANTED; and this case is dismissed.

Dated this 31<sup>st</sup> day of March, 2008.

BY THE COURT:



Lawrence L. Piersol  
United States District Judge

ATTEST:  
JOSEPH HAAS, CLERK

By: Shelly Margulies  
Deputy